APPEAL NO. 93153

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing to consider four individual claims was held on April 29, 1992, in (city), Texas, before hearing examiner (hearing officer). The appellant, hereinafter claimant, appeals the hearing officer's decision and order holding that the claimant was not injured in the course and scope of his employment on or about (date of injury), nor did he timely report such injuries. The claimant essentially contends that the hearing officer's decision is not supported by sufficient evidence, as he argues that his verbal notice of injury should have qualified as timely notice, and that the hearing officer failed to consider medical documentation verifying a compensable injury. Respondent (hereinafter carrier) contends that the claimant's request for review was not timely filed and was not timely provided to the carrier; in the alternative, carrier argues that the hearing officer's decision and order were supported by sufficient evidence.

DECISION

We affirm the decision and order of the hearing officer.

At the outset, we must consider the issue, raised by the carrier, that the claimant's appeal was untimely. The record shows that the hearing officer's decision and order was issued on July 14, 1992. The 1989 Act provides that a party's written appeal shall be filed with the Appeals Panel no later than the 15th day after the date on which the hearing officer's decision is received from the Texas Workers Compensation Commission's (Commission) division of hearings and that the party shall, on the same date, serve a copy of the request for review with the other party. By rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5 (Rule 102.5), the receipt date is deemed to be five days after the date mailed. The record further shows that the claimant's appeal, addressed to "Appeals Clerk, Hearing and Review" at the Commission's Austin address, was date stamped as received by the Commission's Office of the Ombudsman on July 21, 1992. Applying the rules and the statute, the appeal was timely filed.

For some reason, the appeal did not reach the Appeals Panel until late February or early March 1993, as it apparently had been filed in one of the Commission's field offices. Also, while the appeal shows that a (noncertified) copy was sent to the carrier's representative, the carrier represented in its response that it did not receive the appeal until March 1, 1993, when a copy was transmitted by the Commission.

The Appeals Panel has previously held that a party's failure to properly serve a document on the opposing party does not affect the timeliness of the appeal but rather extends the time for an opportunity for response until service is made. *See* Texas Workers' Compensation Commission Appeal No. 91120, decided March 30, 1992. This panel has also been called upon to address the timeliness of appeals which were filed with a Commission field office rather than with the Commission's central office in Austin.

Under such circumstances, if the appeal was filed with the field office within 15 days of receipt of the decision and order, we have held it to be timely filed. *See* Texas Workers' Compensation Commission Appeal No. 93072, decided March 12, 1993; *see also* Texas Workers' Compensation Commission Appeal No. 92045, decided February 25, 1992 (timely appeal inadvertantly sent from Commission's central office to a field office). *Compare* Texas Workers' Compensation Commission Appeal No. 92099, decided May 21, 1992 (wherein the appellant's appeal, originally filed with a field office, was not timely).

It is indeed unfortunate in this case that it took such a lengthy period of time for the claimant's appeal to reach this panel. Despite such circumstances, we are loathe to hold that the claimant's appeal, date stamped as received by the Commission one week after the hearing officer's decision was issued, was not timely. As noted above, we have held that a failure to timely serve an appeal is not jurisdictional, but merely postpones the time period for filing a response, and our deadline for review runs from the date a timely response is filed. Article 8308-6.42(c). Therefore, claimant's request for review is timely.

The facts of the case are thoroughly recited in the hearing officer's decision and order and will not be repeated at length here. The claimant was employed by (employer) as an electrician's helper. He testified that on (date), he was working with his supervisor, (Mr. M), to complete work on a fast food restaurant. About 8:00 that night, while the two of them were pulling wire at some distance from each other, Mr. M pulled the wire suddenly and jerked the claimant as a result. He said he hurt his lower back and his shoulder, and that his leg went to sleep. Claimant said he asked Mr. M what he was trying to do, and said that he had hurt himself. The carrier introduced into evidence claimant's time sheet for the week which included (date) which shows claimant not working past 5:00 or 6:00 p.m. on any night.

On (date), while working at the same job site, the claimant said he aggravated his injury of (date) by pulling cable for several hours. He said he was working with Pat Oldmixon (Mr. O), employer's owner, that day, and that he told him he had been hurt on the 29th and asked if he should see a doctor; he said Mr. O replied that he should finish the job first. When he told Mr. O that the work that day was aggravating his injury, he said Mr. O replied that the workers could alternate their duties.

The claimant said that on November 8th they were dressing out the same building. When he saw that a light was not working he checked it out and found some exposed wires; he turned off the circuit breaker to check it out, but because of improper wiring the circuit breaker was not connected to those wires. As a result, when he touched the wires, a current ran down his arm and into the back of his neck, and stopped in the back of his head. He said he ran down the ladder and held his neck for about five minutes. He said he told Mr. O he had been electrocuted, but Mr. O did not reply. The claimant said that in the course of doing electrical work for the past 10 years he received shocks about twice a

year. However, he said that normally he would be using protective gear, that he didn't in this job, and as a result this shock was worse. As a result of the shock, he said, he has felt lightheaded and has had blurred vision and shortness of breath.

On (date) he was working at the same job site with Mr. M. He said the building was closed up, and butane heaters provided heat. He said there were also fumes from glue that was being used. Claimant was working in the attic on that day. Around 2:00 p.m. he left the building and, upon his return, he blacked out and fell to his knees. About 30 minutes later he decided to leave. He said Mr. M was not reachable at the time, but that he called him from a telephone booth to say he had passed out. Claimant also said Mr. O called him at home the following Sunday to say he expected him to be at work on Monday. Claimant said he told Mr. O about the breathing problems and the blurred vision.

Mr. M, who at the time of the hearing was no longer employed by employer, testified that he was the foreman on this particular job and that he had no knowledge of claimant's back injury or any injury from electrocution or fumes. He recalled the claimant's calling him after having left the job site without prior approval; however, he said claimant merely told him he had left because he felt faint. He conceded that it was possible claimant could have suffered an electrical shock on the job, and that a person could suffer a back injury from pulling cable incorrectly.

Mr. O testified that the first he knew of claimant being injured on the job was on (date), when the claimant called him to say he had hurt his back and to ask whether employer had insurance. Mr. O said the claimant did not mention any injury from electrocution or fumes. He did not recall telephoning claimant on a Sunday night, although he said it was possible. However, he said he would have remembered if claimant had told him about a work-related injury.

Also made part of the record was the signed, transcribed statement of (Mr. A), one of claimant's coworkers. He stated claimant called him some time in December to say he had a sore back from pulling wire, and that he was going to call Mr. O about seeing a doctor. Mr. A also recalled the claimant leaving work because he became nauseated from paint fumes.

The claimant said he did not see a doctor before January 7, 1992 because it was cold and he was having a hard time getting around. On that date, he went to a hospital emergency room where he was seen by (Dr. W). Dr. W's initial medical report of that visit, filed (date), gave the claimant's history as "vague history of dizzy spells at work for 3 weeks prior to low back pain. . . . Patient reports lifting heavy objects at work but no specific injury recalled . . ." His assessment included findings of no swelling, paraspinous or CVA tenderness, negative straight leg raise, no fractures and mild DJD L4-5. He

diagnosed low back strain and prescribed Motrin.

Claimant thereafter began seeing (Dr. H), complaining of low back pain and radicular symptoms, as well as dizziness. He was still treating with this doctor at the time of the hearing. Dr. H, who diagnosed cervical radiculitis and lumbar facet syndrome, wrote on (date) that the claimant could return to limited work on March 30th and that he anticipated a return to full time work and maximum medical improvement (MMI) on May 7th. However, on June 1st he stated that anticipated return to work and MMI dates were "unknown."

The claimant testified that he has not sought medical attention for his electrical shock or fume inhalation injuries.

At the close of the hearing, the claimant's attorney indicated the possibility of locating other witnesses. The hearing officer stated he would reopen the hearing if he was notified, no later than June 30, 1992, that additional evidence would be offered. His decision and order indicates that no such notice was given.

A claimant in a workers' compensation case has the burden of proof to establish that an injury was sustained in the course and scope of his employment. Texas Employers Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). The claimant must also establish that he notified his employer of the injury not later than the 30th day after the date on which the injury occurs. Article 8308-5.01. The hearing officer determined that the claimant in this case did not suffer the injuries as alleged, on (date of injury), nor did he timely notify his employer of such injuries. The evidence in this case was conflicting, but it was the hearing officer's responsibility to reconcile such conflicts, as the hearing officer is the sole judge of the relevance, materiality, weight and credibility of the evidence. Article 8308-6.34(e). His decision will be set aside only if the evidence supporting his determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Upon review of the record, we cannot say that that is the case here.

Accordingly, we affirm the hearing officer's decision and order.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge